IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 802 OF 2007

IN

NOTICE OF MOTION NO. 2274 OF 2000

IN

SUMMARY SUIT NO. 2291 OF 1999

National Agro Chemical Industries Ltd. ..Appellants
(Org. Defendants)

Versus

United Phosphorus Limited. ..Respondents
(Org. Plaintiffs)

Mr. Satish Shetye with Ms. Swati Deshpande i/b. M.S. Bodhanwala & Co. for the appellants.

Mr. Sanjay Kothari i/b N.H. Vyas for Respondents.

CORAM: D.K.DESHMUKH &
J.H.BHATIA,JJ.
DATE : 1st August, 2007.

P.C.

1. By this Appeal, the original defendants in

Summary Suit No.2291 of 1999 challenges the order dated 24th August, 2000 passed by the learned Single Judge of this Court dismissing the Notice of Motion taken out by the defendants for setting aside the ex-parte decree against the appellants. The Summary Suit was filed by the plaintiffs-respondents for recovery of the money which was the price of the goods supplied by the plaintiffs to the defendants. According to the plaintiffs, despite service of the writ of summons, the defendants did not appear. Therefore, the Court passed ex-parte decree against the defendants. The defendants thereafter took out Notice of Motion No.2274 of 2000 for setting aside the decree. There were several grounds raised in support of the plea of the defendants for setting aside the ex-parte decree including that the writ of summons was not served on the defendants. That Notice of Motion was decided by the learned Single Judge by order dated 24th August, 2000 and dismissed the Notice of Motion.

2. We have heard learned Counsel for both the sides.

3. Perusal of the impugned order shows that the learned Single Judge recorded finding that the defendants have succeeded in proving that the defendants were not served with the writ of summons. The learned

Single Judge however, declined to set aside the ex-parte decree by observing that the defendants have not been able to establish that the defendants have a probable defence to offer. Now it is an admitted position that there is no written contract between the parties for payment of interest. It is an admitted position that in the suit, the plaintiffs have claimed interest on the amount claimed in the suit for the period anterior to the date of the institution of the suit. The settled law is that if there is no written contract to pay interest, in a summary suit, a decree for payment of interest cannot be made. It is true that the plaintiffs can abandon that part of their claim and the remaining suit can still be entertained by the Court as a summary suit but that can be done by the plaintiffs only if the suit is pending. This clearly, in our opinion, shows that the defendants have defence to offer which cannot be termed as a moonshine defence. However, we are not expressing any final opinion on this aspect of the matter considering the order that we propose to pass in this Appeal.

4. In the result, therefore, the Appeal succeeds and is allowed. The order dated 24th August, 2000 passed in Notice of Motion No.2274 of 2000 is set side. That Notice of Motion is granted in terms of prayer clause (a).

5. As the Defendants have now appeared and the vakalatnama filed on behalf of the defendants in the Notice of Motion NO.2274 of 2000 shall be treated as vakalatnama filed in the suit. Within two weeks from today, the plaintiffs shall serve the summons for judgment on the Advocate appearing for the defendants in Notice of Motion No.2274 of 2000, who shall accept service of the Summons for Judgment. The defendants shall file their reply and seek leave to defend, if so advised, within two weeks from the date of receipt of the Summons for Judgment.

6. Office shall place the Summons for Judgment for hearing and orders before the appropriate Court thereafter immediately.

7. All contentions available to both the sides are kept open to be urged before the learned Single Judge.

(D.K.DESHMUKH,J.)

(J.H.BHATIA,J.)